IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 316 of 1991

For Approval and Signature:

HONOURABLE MR.JUSTICE DN PATEL

==========

1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

==========

ASGAR YAKUB SHAH & 3 - Appellant(s)
Versus
STATE OF GUJARAT - Opponent(s)

==========

Appearance :
MR EE SAIYED for the Appellants.
MS NANDINI JOSHI, APP for the respondent.

==========

CORAM : HONOURABLE MR.JUSTICE DN PATEL

Date : 17/07/2006

ORAL JUDGMENT

Rule. Learned Additional Public Prosecutor Ms.Nandini Joshi waives service of notice of Rule on behalf of the respondent-State.

This appeal has been preferred against the judgment and order dated 8.3.1991 in Sessions case no. 170 of 1989 passed by the Learned Additional Sessions Judge, Surat, whereby the present appellants have been convicted and sentenced to undergo rigorous imprisonment for one year and ordered to pay a fine of Rs.250/-, in default, further simple imprisonment for one month for the offence punishable under section 324 read with 149 of the Indian Penal Code.

2. The facts leading to the present appeal, are as under:-

On 11th July,1989, Shaukat Pathan and his brother Inayat Pathan were going for recovery of money with the present appellants. Appellants-accused assaulted Shaukat Pathan – injured eye-witness-PW-4 and Inayat Pathan-PW-5 and caused injuries by sword on the head of Shaukat Pathan and also caused injuries on the left hand of Shaukat Pathan by sword and stick. Thereafter, Shaukat was taken to New Civil Hospital at Surat, where he was admitted as an indoor patient and was examined by Dr.Niti D. Shah-PW-1. He was discharged from the Hospital on 19th July,1989. The complaint was filed immediately. Investigation was carried out. The charge sheet was filed

and the Sessions Case was committed to the Sessions Court, Surat. On the evidence on record, the appellants has been convicted for the offence punishable under section 324 read with 149 of the Indian Penal Code.

3. Learned counsel for the appellants further submitted that there are lot of omissions and contradictions in the depositions of the prosecution witnesses. In fact, the complainant is not an eye witness at all. On the basis of hearsay evidence, complaint was filed. Learned counsel for the appellants also submitted that there is also a cross-complaint bearing C.R.No.93 of 1989 registered at Olpad Police Station. There was no intention on the part of the appellants to cause any injury to Shaukat Pathan but the accused have also sustained injuries. This aspect of the matter has not been appreciated by the Trial Court and, therefore, the order of conviction passed by the Trial Court also deserves to be quashed and set aside.

4. Learned counsel for the appellants submitted that the prosecution has examined partisan witnesses and, therefore, their evidence ought not to have been relied upon by the Trial Court. PW-3 is the brother-in-law of injured. PW-5 is brother of injured and, therefore, they

are interested in conviction of the appellant. In fact, the incident had taken place at 2:00 p.m. on 11th July,1989. There are several eye-witnesses. There must be several eye-witnesses. None of them have been examined by the prosecution. In absence of independent witnesses, the conviction awarded by the Trial Court deserves to be quashed and set aside.

5. Learned Additional Public Prosecutor for the respondent-State submitted that there are no omissions and contradictions in the deposition of the prosecution witnesses. On the contrary, there are enough corroborations to the depositions of the injured eye-witness i.e. Shaukat Pathan, who is PW-4 at Exh-28 and by depositions of PW-4 Anvarkhan Pathan and by Inayat Pathan – PW-5 and also by the deposition of PW-1 Dr.Niti Shah. It is submitted by the Learned Additional Public Prosecutor that the appellants caused injuries by using sword and stick. Looking to the injuries caused to Shaukat, which are narrated by PW-1 Dr.Niti Shah, the injuries are sufficient to cause death by weapons used by the present appellants. The description narrated by the injured eye-witness and other eye-witnesses, so far as assault is concerned, the injuries are corresponding as per deposition of PW-1. Even injured eye-witness Shaukat

Pathan was admitted in the Hospital from 11th July,1989 to 19th July,1989. The presence of the accused is also revealed by the complaint bearing C.R.No.93 of 1989 registered at Olpad Police Station, Surat. Learned Additional Public Prosecutor submitted that injuries caused by Babu Sada as referred in the evidence were only trifle in nature, and, therefore, the prosecution is not required to explain the same. This has been rightly appreciated by the Trial Court in para-11 of the judgment. Looking to the depositions of eye-witnesses, the order of conviction passed by the Trial Court is absolutely true, correct and in consonance with the evidence on record.

6. Having heard the learned counsel for both the sides and looking of the evidence on record, the order of conviction passed by the Trial Court in Sessions Case No.170 of 1989 is absolutely true and correct for the following facts and reasons :-

(i) Looking to the evidence on record, it appears that on 11th July,1989 at about 2:00 p.m., Shaukat Pathan and Inayat Pathan were assaulted by the present appellant when they had gone for recovery of the money, which were due to Shaukat and to be paid by the present appellants.

They caused injuries to Shaukat Pathan by sword and sticks. Shaukat, who is an injured eye-witness-PW-4 was taken to New Civil Hospital, Surat. Looking to the deposition of Dr.Niti Shah -PW-1, she has narrated the injuries, which are tallying with the narration of incident given by Shaukat Pathan. Looking to his deposition, there are no omissions and contradictions in his deposition. As he is an injured eye-witness, whose presence is also established, the usage of weapon is also established, then there is no reason for this Court to believe that he is not a trustworthy witnesses. His version is corroborated by version of PW-3, who is examined at Exh-27, who has also narrated the incident in detail and pointed out that the present appellants caused injuries by sword and stick. The injuries were caused on the head and on the left hand of Shaukat Pathan. Looking to the deposition of this this eye-witness, the case of the prosecution gets corroborated. Similarly, looking to the deposition of Inayat Pathan, PW-5, who had accompanied Shaukat, who had seen the incident and also narrated that the appellants caused injuries with sword and sticks. Looking the depositions of PW-3, 4 and 5, there are no inconsistencies nor are there any contradictions and omissions in their depositions. Looking to their cross-examination also, nothing is

coming out in favour of he present appellants. Thus, the depositions of PW-3 and 5 are corroborative to injured eye-witness PW-4.

(ii) Learned counsel for the appellants submitted that apart from injured eye-witness, PW-3 and 5 are brother-in law of the injured and brother of the injured. They are partisan witnesses and, therefore, they are not trustworthy witnesses. This contention is not accepted by this Court mainly for the reason that when they are partisan witnesses, the Court has to look to their depositions more carefully but there is no rule that partisan witnesses are untrustworthy witnesses. Looking to the facts of the present case, it seems that Shaukat Pathan injured eye-witness was going with Inayat Pathan-PW-5, who is his brother, were going for recovery of his money, which were to be paid by the present appellants. The amount were due because of sale of fruits and vegetables and they were assaulted. Looking to the facts of the present case, though they are partisan witnesses, their presence is natural and looking to their depositions, they are corroborated by deposition of Dr.Niti Shah -PW-1. They are trustworthy witnesses, whose depositions are corroborated by the depositions of the prosecution witnesses including the deposition of

Mr.Niti Shah.

(iii) Looking to the deposition of Police witnesses, the panchnama of scene of offence is proved. The recovery of weapons is also proved. Panchas have turned hostile but they have admitted their signatures on the panhnama. Looking to the depositions of police witnesses, they have narrated investigation and how the panchnamas were drawn. Looking to the scene of offence panchnama and recovery of weapons panchnama, they are corroborative to prosecution case.

7. As a cumulative effect of the aforesaid facts and evidence on record, the order of conviction passed by the Trial Court, for the offence punishable under section 324 read with 149 of the Indian Penal Code is true and correct. So far as quantum of punishment is concerned, looking to the date of offence, it had taken place in the year July,1989. At present, the appellants are on bail. It is also contended by the learned advocate for the appellants that appellants should have been given the benefit of Probation of Offenders Act,1958 but the said benefit was not given by the Trial Court. The same contention has been raised before this Court and it is also pointed out that there are no antecedents. Much time

has lapsed from the date of incident and also coupled with the fact that the offence punishable under section 324 is compoundable and, therefore, whatever imprisonment has been undergone, may be awarded to the accused-appellant.

8. Learned Additional Public Prosecutor further submitted that appellant No.1 has remained in judicial custody for 35 days. Appellant No.2 has remained in judicial custody for 27 days and appellant No.3 has remained in judicial custody for 35 days and appellant No.4 has remained in judicial custody for 42 days.

9. Looking to the facts and circumstances of the case and keeping in mind the date of incident, I hereby alter the sentence awarded by the Trial Court. I hereby award the sentence to all the appellants to the extent whatever they have undergone in judicial custody and fine of Rs.5,000/-, which the appellants shall deposit before the Sessions Court at Surat on or before 21st August,2006. This amount shall be permitted to be withdrawn by Shaukat Pathan, who is injured eye-witness-PW-4, upon his application and upon verification as to his identity. Appeal is allowed to aforesaid extent. Rule made absolute to the aforesaid extent.

(D.N.PATEL,J)

*dipti